BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CLAUDE T. SHELTON	)	
Claimant	)	
V.	)	
	)	
ATEC STEEL, LLC	)	
Respondent	)	Docket No. 1,064,620
AND	)	
	)	
HARTFORD INSURANCE COMPANY	)	
OF THE MIDWEST	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), through Shelly Naughtin, requested review of Administrative Law Judge Steven Roth's July 29, 2016 Award. Kala Spigarelli appeared for claimant. The Board heard oral argument on November 17, 2016.

RECORD AND STIPULATIONS

The Board carefully considered the record and we have adopted the Award's stipulations, with two exceptions. The Award references an August 23, 2013 preliminary hearing transcript, but no hearing was held and no transcript was made. Also, the parties agreed to an October 16, 2012 date of injury by repetitive trauma, not October 12, 2012.

ISSUES

Claimant alleged bilateral arm injuries by repetitive trauma commencing August 20, 2011. The parties agreed claimant's legal date of injury by repetitive trauma was his last day worked, October 16, 2012. The judge found claimant sustained carpal and cubital tunnel injuries which arose out of and in the course of his employment. The judge awarded claimant permanent partial disability (PPD) benefits based on a 56.8% work disability. Future and unauthorized medical benefits were also awarded.

Respondent concedes claimant's carpal tunnel injuries are compensable, but argues claimant's work was not the prevailing factor causing his cubital tunnel injuries, impairment or disability. Respondent argues claimant is not entitled to a work disability award because his permanent work restrictions only concerned his non-compensable cubital tunnel condition and not his carpal tunnel injuries. Respondent denies claimant is entitled to future medical treatment. Respondent asserts the judge miscalculated the award by granting PPD benefits before claimant concluded medical treatment, reached maximum medical improvement or any doctor assigned him permanent impairment. Claimant maintains the Award should be affirmed.

The issues are:

1. Did claimant's cubital tunnel injuries arise out of and in the course of his employment?

2. What is the nature and extent of claimant's disability?

3. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant, currently 47 years old, was hired by respondent as a pipe fitter and welder in August 2011. Prior to working for respondent, claimant worked as a welder through the Boilermakers Union for approximately 11 years.

Claimant welded for respondent with a three to four pound welding gun. He pulled the gun trigger and performed repetitive side to side movements. Most times, he placed one of his elbows on a welding surface and used his other arm for support. He also used three to four pound grinders and hammered things into place.

Shortly after starting work for respondent, claimant was assigned to a project that was more difficult than his customary level of work. He testified the materials were thicker so he had to use more pressure than usual and it took longer to weld and grind. Within weeks of starting work, claimant began having numbness, pain, tingling and burning in his hands and wrists. He reported his symptoms to respondent and was referred to an occupational medicine clinic. According to claimant, treatment consisted of a splint and light duty restrictions, which helped temporarily. After a second visit, he was released to full duty and began welding with his left hand because his right wrist would lock up. Claimant continued to work, but testified his right hand symptoms progressively worsened and he began having similar problems in his left hand. Claimant testified he never had problems with his hands, wrists or elbows until he worked for respondent.

Claimant sought treatment on his own through his primary care physician who referred him to M. Ellen Nichols, M.D., a neurosurgeon. After undergoing an EMG on August 23, 2012, claimant was diagnosed with severe bilateral carpal tunnel syndrome (CTS) with his right arm being worse. Dr. Nichols recommended surgery. Claimant's last day of actual work with respondent was October 16, 2012. Claimant took leave under the Family Medical Leave Act (FMLA).

On October 17, 2012, Dr. Nichols performed carpal tunnel surgery on claimant's right hand and operated on his left hand on December 7, 2012. While claimant testified his symptoms improved following his surgeries, he continued to have pain and numbness in his ring and small fingers of both hands into his elbows, in addition to popping and cracking in his wrists.

Respondent terminated claimant on January 22, 2013, after his FMLA leave expired.

On April 9, 2013, claimant, at his attorney's request, saw Edward Prostic, M.D., a board-certified orthopedic surgeon. Dr. Prostic is not board-certified as a hand specialist. Claimant complained of intermittent ache from his ring and little fingers up to each elbow, particularly with forceful use of his hands, and loss of grip strength. The doctor noted claimant's continuing symptoms were predominantly from ulnar nerve entrapment and recommended an EMG and additional surgery if symptoms persisted. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th Edition (hereinafter *"Guides"*), Dr. Prostic gave claimant a 20% impairment to each upper extremity for a combined 23% whole person impairment. Dr. Prostic stated the prevailing factor in causing claimant's injury, medical condition, need for medical treatment and resulting disability or impairment was his repetitive trauma while working for respondent.

Pursuant to an agreement reached by the parties on August 23, 2013, Administrative Law Judge Brad E. Avery appointed Lanny Harris, M.D., who is board-certified as an orthopedic surgeon and as an orthopedic hand surgeon, to provide opinions regarding prevailing factor and additional medical treatment. Claimant saw Dr. Harris on October 12, 2013, and complained of aching pain, numbness and tingling in the ulnar border of his hands with proximal radiation to his forearms. After reviewing medical records, interviewing claimant and performing a physical examination, the doctor diagnosed claimant with bilateral cubital tunnel syndrome and residuals from carpal tunnel surgery. Like Dr. Prostic, Dr. Harris opined claimant's employment was the prevailing factor causing his symptoms. Dr. Harris recommended a repeat EMG of claimant's upper extremities and probable cubital tunnel releases. The doctor also recommended claimant seek different employment if he had the surgeries.

An EMG performed on February 11, 2014, was consistent with bilateral CTS at the wrists and mild right ulnar neuropathy at the elbows consistent with cubital tunnel syndrome.

In March 2014, Dr. Harris reversed his opinion after receiving a letter from respondent's attorney and stated:

> I have reviewed the records. Since the EMG that was done in October 2012 did not show ulnar nerve involvement and the current EMG does show this, it would be my conclusion that this did not develop during his employment at Atec Steel. His ulnar nerve entrapment probably did develop as some time thereafter. Therefore, I do not believe this is related to his employment at Atec Steel.[1]

[1] Harris Depo., Ex. 6 at 62.

On July 3, 2014, claimant saw Lynn Ketchum, M.D., a board-certified orthopedic physician who is a hand, wrist and upper extremity specialist with a certificate of added qualifications in surgery of the hand, for another independent medical evaluation ordered by Judge Avery. In addressing causation, Dr. Ketchum stated:

> It is my opinion within a reasonable degree of medical certainty that the prevailing factor in causing not only his carpal tunnel syndromes but his cubital tunnel syndromes was the repetitive work that he did at ATEC with repetitive elbow flexion and pressure on the ulnar nerves.[2]

Dr. Ketchum agreed with Dr. Harris regarding claimant's need for right cubital tunnel surgery, as well as Kenalog injections to claimant's ring and small fingers. Dr. Ketchum noted claimant would need left elbow ulnar nerve surgery at some point.

On September 3, 2014, Judge Avery ordered respondent to provide treatment for claimant's upper extremities with Dr. Harris based on Dr. Ketchum's recommendations.

On December 3, 2014, Dr. Harris performed right ulnar nerve and trigger finger surgeries on claimant and similar surgeries to claimant's left side on February 6, 2015.

Dr. Harris last examined claimant on May 28, 2015. Dr. Harris noted claimant had residuals of CTS and had positive Tinel's and Phalen's testing. For claimant's cubital tunnel syndrome, the doctor released claimant with permanent restrictions of no repetitive heavy lifting over 15 pounds with either hand. While Dr. Harris recommended another bilateral upper extremity EMG, it was not performed.

Dr. Harris testified a patient can develop cubital tunnel syndrome from repetitively bending his or her elbows and claimant's work could cause cubital tunnel syndrome. Absent the repeat EMG, Dr. Harris testified he does not know if claimant has any residuals from his CTS, but did not think claimant had any CTS impairment. The doctor also indicated his opinion claimant had no CTS impairment would not be final unless claimant had the repeat EMG, two-point discrimination testing and another physical examination. Nevertheless, using the *Guides*, Dr. Harris gave claimant no impairment for his CTS or trigger finger conditions, but an 18% impairment to each upper extremity for his cubital tunnel syndrome, which combined to be a 33% whole person impairment.

Dr. Harris indicated claimant could not perform four of seven tasks he performed for respondent as identified by Paul Hardin, a vocational consultant, and possibly could not perform five of seven tasks, depending on the weight and frequency of items lifted, moved and carried in task number five. The doctor indicated claimant could not return to work as a welder. Dr. Harris did not consider tasks claimant did for other employers.

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[2] Ketchum Report at 2.

Dr. Harris testified claimant possibly could have had cubital tunnel syndrome in 2012 despite the negative EMG. Dr. Harris testified he did not think claimant had cubital tunnel syndrome in 2012 or that it was caused by his work for respondent.[3]

Claimant returned to Dr. Prostic on June 17, 2015, for reevaluation. Claimant complained of ring and small finger numbness, right greater than left, and sometimes in his right middle finger, in addition to bilateral loss of grip strength and intermittent popping of his elbows, wrists and fingers. The doctor stated the prevailing factor for the development of claimant's stenosing tenosynovitis of his fingers, bilateral CTS and bilateral cubital tunnel syndrome was repetitive trauma while working for respondent. Dr. Prostic opined claimant needed no additional medical treatment.

Using the *Guides*, Dr. Prostic gave claimant a 25% impairment to each upper extremity for a combined 28% whole person impairment. Dr. Prostic testified his impairment rating increased because the "objective findings were significantly worse."[4] Dr. Prostic testified claimant lost the ability to perform 12 of 14 non-duplicative tasks in Mr. Hardin's task list for an 86% task loss. Dr. Prostic issued permanent work restrictions of no repetitive lifting over 15 pounds, no impact tools, no vibratory tools and no repetitive hand-intensive work. Such restrictions were for claimant's carpal tunnel and cubital tunnel injuries. When asked if claimant required future medical treatment, Dr. Prostic stated, "At this time I don't think he needs it."[5]

Dr. Prostic acknowledged the 2012 EMG did not show evidence of cubital tunnel syndrome. The doctor testified he did not initially examine claimant for triggering fingers (stenosing tenosynovitis) and did not make such diagnosis in 2013.

Mr. Hardin interviewed claimant by phone on July 15 and August 3, 2015, on behalf of claimant's attorney. Given claimant's education, training, work experience, geographical area and the medications he takes, Mr. Hardin concluded claimant has "a 100 percent loss and is essentially and realistically unemployable."[6]

Terry Cordray, a certified rehabilitation counselor, interviewed claimant by phone on January 26, 2016, at respondent's request. Mr. Cordray testified claimant received unemployment benefits for six to eight months after his injury, and during that time, he applied for jobs that were heavier positions. Claimant confirmed he felt he was ready, willing and able to do welding jobs or to be an auto mechanic. Mr. Cordray indicated

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[3] Harris Depo. at 36.

[4] Prostic Depo. at 16.

[5] *Id*. at 18.

[6] Hardin Depo. at 11.

claimant is capable of earning at least $10 per hour as a cashier in Kansas, in addition to up to $14 per hour as a forklift driver. However, the latter job would require gripping. Mr. Cordray testified claimant could realistically earn $10 per hour.[7]

Claimant testified he continues to have bilateral numbness and aching in his ring and small fingers and thumbs with pain radiating into both elbows and shoulders, the right worse than the left. Claimant testified he applied for employment following his termination, but was not offered a job. He currently draws social security disability. He performed side jobs of making knives and assisting with tornado clean-up, both of which he acknowledged required the use of power and vibratory tools. No doctor testified claimant's knife making or tornado clean-up caused his arm problems. Claimant testified his symptoms predated his knife-making and tornado clean-up efforts.

The judge currently assigned to this case made several findings:

- Claimant sustained personal injury by repetitive trauma arising out of and in the course of employment while employed by respondent. Such injuries included both bilateral CTS and cubital tunnel syndrome and were supported by the opinions of Drs. Prostic and Ketchum, and Dr. Harris' initial opinion. Dr. Harris' reversal of opinion based on a comparison of the EMG studies alone was discounted.

- Claimant sustained, as a result of his repetitive work, a whole body impairment of 28% to the body as a whole based on Dr. Prostic's rating which accounted for both CTS and cubital tunnel syndrome.

- When considering all of the evidence, including medical opinions and claimant's work status and abilities, claimant proved a 56.8% work disability. Such figure was based on splitting task loss opinions from Dr. Prostic at 86% and Dr. Harris at 71% for a 78.5% task loss and a 35.1% wage loss based on comparing claimant's hourly wage for respondent of $28.48 and his capability to earn $10 per hour.

- Claimant, "by the narrowest of margins,"[8] was entitled to unauthorized and future medical compensation despite no direct medical evidence.

Respondent appealed.

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[7] Cordray Depo. at 34, 43.

[8] ALJ Award at 13.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by repetitive trauma arising out of and in the course of employment. According to K.S.A. 2012 Supp. 44-501b(c), the burden of proof is on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 states in part:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. . . .
>
> . . .
>
> (f)(2)(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
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> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
>
> . . .
>
> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-510e states, in part:

(a) In case of whole body injury resulting in . . . permanent partial general disability not covered by the schedule . . . the employee shall receive weekly compensation as determined in this subsection during the period of . . . permanent partial general disability not exceeding a maximum of 415 weeks.

. . .

(2)(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks

which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

. . .

(F) The amount of compensation for whole body injury under this section shall be determined by multiplying the payment rate by the weeks payable. As used in this section: (1) The payment rate shall be the lesser of: (A) The amount determined by multiplying the average weekly wage of the worker prior to such injury by 66⅔%; or (B) the maximum provided in K.S.A. 44-510c, and amendments thereto; (2) weeks payable shall be determined as follows: (A) Determine the weeks of temporary compensation paid by adding the amounts of temporary total and temporary partial disability compensation paid and dividing the sum by the payment rate above; (B) subtract from 415 weeks the total number of weeks of temporary compensation paid as determined in (F)(2)(A), excluding the first 15 such weeks; and (3) multiply the number of weeks as determined in (F)(2)(B) by the percentage of functional impairment pursuant to subsection (a)(2)(B) or the percentage of work disability pursuant to subsection (a)(2)(C), whichever is applicable.

(3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.

The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

K.S.A. 2012 Supp. 44-510h(e) states, in part:

> It is presumed that the employer's obligation to provide the services of a health care provider . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Kansas workers compensation appellate cases emphasize literally interpreting and applying plainly-worded workers compensation statutes.[9] The text of a statute should not be supplanted by information outside the plain wording of a statute.[10]

Board review of an order is de novo on the record.[11] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[12] On de novo review, the Board makes its own factual findings.[13]

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[14] The trier of fact decides which testimony is more accurate and/or credible and may adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must decide the nature and extent of injury and is not bound by the medical evidence.[15]

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[9] See *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 361 P.3d 504 (2015); *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009); see also *Fernandez v. McDonald's*, 296 Kan. 472, 478, 292 P.3d 311 (2013); *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 618, 256 P.3d 828 (2011); *Hall v. Knoll Bldg. Maint., Inc.*, 48 Kan. App. 2d 145, 152, 285 P.3d 383 (2012); *Messner v. Cont'l Plastic Containers*, 48 Kan. App. 2d 731, 741-42, 298 P.3d 371 (2013), *rev. denied* (Aug. 30, 2013); and *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[10] See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 560-61, 293 P.3d 723 (2013).

[11] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[12] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[13] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[14] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[15] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *superseded on other grounds by statute.*

ANALYSIS

1. Claimant's bilateral cubital tunnel syndrome was due to his repetitive work for respondent.

Respondent stresses Dr. Harris' final opinion that claimant's cubital tunnel syndrome was not work-related because the 2012 EMG showed no evidence of such condition.

However, there is contrary evidence. Dr. Prostic clinically examined claimant six months after he last worked and diagnosed him with ulnar nerve entrapment or cubital tunnel syndrome. Dr. Ketchum reached the same conclusion and his report is in evidence based on K.S.A. 2012 Supp. 44-516(a). Even Dr. Harris initially reached this conclusion after examining claimant, having reviewed claimant's medical records (including the 2012 EMG report) and knowing claimant's work history.

We are left with a simple question: if claimant's work did not cause his cubital tunnel syndrome, what did? All of the doctors indicated claimant's repetitive work was competent to cause his cubital tunnel syndrome. No doctor identified a likely alternative cause. While Dr. Harris thinks claimant's cubital tunnel syndrome is due to some unknown cause occurring after claimant's employment, the Board places substantially more weight in claimant's known job activities to be the cause of all of his upper extremity injuries. The Board places greater weight in the medical opinions of Drs. Prostic and Ketchum. Claimant's repetitive work caused his injuries and was the prevailing factor in his injuries, medical condition and his impairment and disability.

2. As a result of his work injuries, claimant sustained a 28% whole body functional impairment and a 76% work disability.

The Board agrees with the judge's analysis regarding claimant's functional impairment. Dr. Prostic properly accounted for all of claimant's work-related impairment.

Claimant stated at oral argument that he was agreeable to the judge's finding that he sustained a 56.8% work disability, largely because such figure resulted in a maximum work disability award of $130,000. The Board agrees claimant's total award is $130,000 and we could simply affirm the judge's ruling. However, two matters call our attention.

First, the Board concludes claimant's task loss cannot be based, in part, on Dr. Harris' opinion. Dr. Harris only considered claimant's ability to perform seven tasks he did for respondent. Statutorily, a physician must consider all tasks a claimant performed in substantial and gainful employment for the five years predating the injury. Dr. Harris' opinion contravenes K.S.A. 2012 Supp. 44-510e(a)(2)(D) because he did not consider all tasks claimant performed in the relevant five year period. Only Dr. Prostic gave a statutorily appropriate task loss opinion, which was an 86% task loss.

Second, claimant's wage loss is based on comparing his average weekly wage at the time of his injury, including discontinued fringe benefits, with a post-injury average weekly wage. Therefore, comparing claimant's pre-injury hourly rate with his post-injury hourly earning capability is not what our law requires.

The best evidence establishes claimant can earn $10 per hour. Assuming claimant can perform full-time work of 40 hours per week, he would have a post-injury AWW of $400. Comparing claimant's average weekly wage of $1,171.50 with his post-injury earning capability of $400 results in a wage loss of 66%.

Averaging claimant's wage loss and task loss results in him having a 76% work disability.

As for respondent's arguments that the judge's calculation of the award was incorrect, the Board disagrees. Respondent posits PPD benefits cannot be awarded before claimant had the bulk of his treatment, including his surgeries, before he reached maximum medical improvement (MMI) and before he was given permanent impairment ratings or restrictions; i.e., it defies common sense to dole out money to claimant for a permanent condition before his condition was truly permanent. However, the Kansas Legislature, through K.S.A. 2012 Supp. 44-510e(a)(2)(F)(3), established a presumption that claimant's permanent disability existed immediately after his injury. Additionally, the law does not instruct the Board to award PPD only after claimant has completed medical treatment, reached MMI and only after permanent impairment and restrictions have been imposed. To do so would be to add language that does not exist to the statute.

The Board also notes the Award used incorrect compensation rates in calculating the award. The correct compensation rate is $570, not $555. Neither party mentioned the rate of compensation as an issue in their briefs or in oral argument. Nevertheless, the Board will use the correct compensation rate in calculating this award. Regardless of the amount of the compensation rate, claimant still is entitled to a $130,000 award.

3. Claimant did not prove entitlement to future medical treatment.

Dr. Prostic did not indicate claimant needed future medical treatment. Claimant has had all of the treatment recommended by Dr. Ketchum. Dr. Harris' recommendations for an EMG, two-point discrimination testing and another evaluation were for the purpose of fine-tuning his assessment of claimant's impairment, not for medical treatment. There was either no evidence or insufficient medical evidence establishing claimant would more probably than not require medical treatment in the future. Claimant did not carry his burden of proof on this issue.

CONCLUSIONS

Claimant's bilateral cubital tunnel syndrome was work-related and he satisfied the prevailing factor standard. Due to his upper extremity injuries, claimant sustained a 28% whole body functional impairment and a 76% work disability. However, claimant did not prove entitlement to future medical treatment.

AWARD

WHEREFORE, the Board modifies the July 29, 2016 Award as set forth above.

Using a weekly rate of $570, claimant is entitled to 104.14 weeks of PPD compensation or $59,359.80 for a 28% functional impairment[16] followed by 55 weeks of temporary total disability (TTD) compensation or $31,350 followed by weekly PPD payments not to exceed $130,000 for a 76% work disability.

As of November 22, 2016, there would be due and owing to claimant the $31,350 in TTD plus 159 weeks of PPD of $121,980, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $8,020 shall be paid at the rate of $570 per week until fully paid or until further order.

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

[16] This calculation results in claimant receiving .86 weeks less PPD than the value of a 28% whole body functional impairment rating. However, claimant began receiving TTD benefits starting October 16, 2014, and he is not entitled to get both PPD and TTD for the same time. Additionally, when claimant's TTD ceased, he was eligible for work disability and he cannot be awarded PPD for work disability and functional impairment together.

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